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No. 92-1147

IN THE

Supreme Court of the United States

October Term, 1992

NWABUEZE V. OKOCHA,
Petitioner,

vs.

CASE WESTERN RESERVE UNIVERSITY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the United States District Court for the Northern District of Ohio abuse its discretion under Rule 6(b) or Rule 56(f) of the Federal Rules of Civil Procedure by denying Petitioner's fifth request for an extension of time to conduct discovery and/or file his brief opposing Respondents' motion for summary judgment, when Petitioner had over one year to conduct any necessary discovery and file a response to the pending motion?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DECISIONS AND JUDGMENTS OF THE COURTS BELOW

The August 28, 1992 decision of the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") denying Petitioner's Petition For Rehearing And Rehearing *En Banc*, and the Sixth Circuit's July 13, 1992 decision affirming the September 12, 1991 order of the United States District Court, Northern District of Ohio ("District Court"), are reproduced at the Appendix to the Petition For Writ of Certiorari at A-1 and A-2, respectively. The September 12, 1991 decision of the District Court is also reproduced at the Appendix to the Petition For Writ of Certiorari at A-3. The February 29, 1988 marginal entry order of the District Court denying Petitioner's February 28, 1988 Motion for Extension of Time is reproduced herein at A1.

FEDERAL RULES AND PROVISIONS INVOLVED

Rule 6 of the Federal Rules of Civil Procedure:

Rule 6. TIME

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect;

but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), 60(b), and 74(a), except to the extent and under the conditions stated in them.

(c) [Rescinded effective July 1, 1966.]

(d) For Motions—Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.

RULE 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or crossclaim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or crossclaim is asserted or a declaratory judgment is sought may,

at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the

affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specified facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment if appropriate, shall be entered against the adverse party.

(f) **When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

STATEMENT OF THE CASE

This matter comes to this Court on a Petition for Writ of Certiorari to the Sixth Circuit seeking a review of that court's July 13, 1992 decision which affirmed the March 1, 1988 Marginal Entry Order of the District Court. In the marginal order, the District Court denied Petitioner's February 29, 1988 Motion For Extension of Time (the "Motion for Extension") to respond to the motion for summary judgment filed on February 17, 1987 by Respondents, Case Western Reserve University, *et al.*[1] (*See* A1). Petitioner did not assign as error and the Sixth Circuit did not address the merits of the District Court's September 12, 1991 award of summary judgment to Respondents; rather, Petitioner raised before the Sixth Circuit as his sole issue presented for review the District Court's purported abuse of its discretion in denying the Motion for Extension (*See* Petitioner's Sixth Circuit "Statement Of Issues Presented", at A12).

On May 8, 1986, Petitioner filed a complaint in the District Court which was amended on May 28, 1986 to set forth fifteen (15) purported causes of action against Respondents. On February 17, 1987, nearly ten (10) months after Petitioner filed his original complaint, Respondents filed a motion for summary judgment (the "Respondents' Motion") as to all fifteen counts of the amended complaint. On March 6, 1987, Petitioner moved for an unspecified enlargement of time in which to file his brief opposing Respondents' Motion. The District Court did not rule on this motion.

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[1] Also named as defendants (and as additional Respondents herein) were Allen C. Holmes (former Chairman of the University Board of Trustees), David V. Ragone (former President of the University) and University Professors Lucille S. Mayne, Jerome B. Lando, Jack L. Koenig and Hugh Brown.

On April 27, 1987, Petitioner moved for a second briefing extension, this time requesting that a previously established April 27, 1987 discovery cut-off date be extended to August 31, 1987, in order to allow him more time to conduct the discovery necessary to respond to the Respondents' Motion. Although the District Court did not rule on Petitioner's April 27, 1987 motion, in May of 1987 Petitioner deposed two fact witnesses as well as Dr. Mayne. Between June of 1987 and November 12, 1987, Petitioner conducted no discovery.

On November 12, 1987, Petitioner filed a third request for additional time which was characterized as a Substituted Motion for Extension of Time to Complete Discovery and which requested November 31 [sic], 1987, as the new discovery cut-off date. On November 30, 1987, the District Court granted Petitioner an extension of time until December 11, 1987, to complete discovery and to file his brief opposing Respondents' Motion (*See* November 30, 1987 order at A9). The November 30, 1987 Order also provided that Petitioner would be granted *no* further extensions of time.

Petitioner then noticed a series of depositions to be taken through December 10, 1987, the day before his response was due. On December 9, 1987, the District Court conducted a discovery conference at which Petitioner orally made his fourth motion for an extension of time to conduct discovery and file his brief in opposition. The matters resolved at the discovery conference were reduced to writing and evidenced by a December 10, 1987 order which provided in pertinent part:

* * *

> 3. [T]hat the *discovery deadline in this matter is hereby extended to December 24, 1987*;

> 4. that [*Petitioner*] *shall respond to the* [*Respondents'*] *motion for summary judgment on or before February 29, 1988*; and
>
> 5. there will be *no further extensions of the dates* set forth in paragraphs 3 and 4.

(*See* December 10, 1987 Order at A11) (emphasis added).

Petitioner conducted depositions on December 8, 9, 10, 14, 15, 22 and 23, 1987. Prior to the December 24, 1987 expiration of the discovery period, Petitioner neither moved to extend the discovery period, nor requested additional time to conduct specific discovery which he believed he needed to file his brief opposing Respondents' Motion, which by now had been in his possession for close to a full year.

On February 29, 1988, the day his brief opposing Respondents' Motion was due, and sixty-seven (67) days after the expiration of the discovery period, Petitioner made his fifth request for an extension of time, citing both Rules 56(f) and 6(b) of the Federal Rules of Civil Procedure (*See* Motion for Extension at A1). In his motion Petitioner did not claim that he needed the additional time to conduct further discovery for his opposing brief. Rather, Petitioner focused on his own court reporter's inability to prepare the transcripts of the depositions taken in December of 1987 (*See* A4).

The District Court denied Petitioner's Motion for Extension by marginal order dated March 1, 1988 (*See* A2). During the ensuring three and one-half years, Petitioner did not file or proffer any of his deposition transcripts or any other evidence with the District Court. In fact, Petitioner filed nothing more with the District Court until after it ruled on Respondents' Motion.

On September 12, 1991, the District Court granted Respondents' Motion and dismissed the case with prejudice (*See* September 12, 1991, District Court Memorandum of Decision and Order, at Appendix A-1 to Petition for Certiorari). Petitioner then appealed, raising the District Court's denial of the Motion for Extension as his sole issue presented for review (*See* A12). On July 13, 1992, the Sixth Circuit affirmed the District Court's denial of the Motion for Extension. Thereafter, Petitioner filed a Petition for Rehearing and Rehearing *En Banc*, which the Sixth Circuit denied on August 28, 1992. On November 27, 1992, Petitioner filed a Petition for a Writ of Certiorari to the Sixth Circuit.[2]

[2] By letter dated December 8, 1992, the Clerk of this Court returned the Petition for a Writ of Certiorari for its failure to comply with this Court's Rules of Practice. On or about January 4, 1993, Petitioner filed a revised Petition for a Writ of Certiorari.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion Under Rule 6(b) Or Rule 56(f) Of The Federal Rules Of Civil Procedure When It Denied Petitioner's Fifth Request For Additional Time To File A Brief Opposing Respondents' Motion.

The Sixth Circuit applied well-established legal principles in affirming the District Court's denial of Petitioner's fifth request to conduct discovery and/or file his brief opposing Respondent's Motion. Its decision is in accord with case law from other federal circuit and district courts which have considered requests for extensions of time to conduct discovery and/or to respond to a pending motion, whether filed pursuant to Rule 6(b) or Rule 56(f) of the Federal Rules of Civil Procedure. Also, the Sixth Circuit's decision does not stray so far from the "usual course of judicial proceedings" in construing and applying Rules 6(b) and 56(f) which would necessitate further review by this Court. *See* Sup.Ct.R. 10.1(a). Since the Sixth Circuit's affirmance of the District Court's decision was appropriate, the Petition for Certiorari must be denied.

It is well established that a district court has *considerable* discretion to grant or deny any motion for extension of time brought pursuant to Rule 6(b). *See Mendez v. Banco Popular De Puerto Rico,* 900 F.2d 4 (1st Cir. 1990), wherein the non-moving party presented the district court with three requests for extensions of time to respond to a pending motion for summary judgment. The district court granted the first request by allowing the non-moving party an additional thirty (30) days to respond. Thereafter, the non-movant requested a second extension, which was denied by the district court.

The non-movant then asked the district court for a third extension, citing Hurricane Hugo as the primary reason. In the meantime the deadline for filing the opposing brief passed. The district court denied the third extension and granted the motion for summary judgment. *Mendez v. Banco Popular, supra*, 900 F.2d at 10.

On appeal, the First Circuit upheld the district court's decisions to deny the non-movant's second and third requests, deferring to the considerable discretion of a district court in managing its docket:

> Rules are rules—and the parties must play by them. In the final analysis, the judicial process depends heavily on the judge's credibility. To ensure such credibility, a district judge must often be firm in managing crowded dockets and demanding adherence to announced deadlines. If he or she sets a reasonable due date, parties should not be allowed casually to flout it or painlessly to escape the foreseeable consequences of noncompliance. Moreover, appellate courts cannot too readily agree to meddle in such case-management decisions lest the local court's authority be undermined and the system sputter. . . . In the absence of a manifest abuse of discretion, then, we will not interfere with a district court's reasoned refusal to grant incremental enlargements of time. We discern no such abuse in the present case.

Mendez v. Banco Popular, supra, 900 F.2d at 7 (citation omitted). *See also, Hoffman v. Kennedy*, 30 F.R.D. 50 (E.D. Pa. 1962).

Decisons whether to grant or deny Rule 56(f) requests likewise rest in the sound discretion of the trial court.[3] *Securities & Exchange Commission v. Spence &*

[3] Respondents recognize the incongruity of citing case authority construing Rule 56(f) when, in fact, Petitioner did not request additional time to conduct discovery in his last motion for an extension.

Green Chemical Co., 612 F.2d 896, 901 (5th Cir. 1980), *cert. denied*, 449 U.S. 1082, 101 S. Ct. 866, 66 L. Ed. 2d 806 (1981); *Glen Eden Hospital v. Blue Cross & Blue Shield of Michigan*, 740 F.2d 423, 428 (6th Cir. 1984); *Pfeil v. Rogers*, 757 F.2d 850, 856 (7th Cir. 1985), *cert. denied*, 475 U.S. 1107, 106 S. Ct. 1513, 89 L. Ed. 2d 912 1986); *Barfield v. Brierton*, 883 F.2d 923, 931 (11th Cir. 1989).[4] As a result, a district court's decision to grant or deny a continuance pursuant to Rule 56(f) will be disturbed on appeal only if the district court's decision reflects an abuse of that discretion. *Paul Kadair, Inc. v. Sony Corp. of America*, 694 F.2d 1017, 1029 (5th Cir. 1983). Notably, a Rule 56(f) request will not be granted where a non-diligent party has failed to make use of the various discovery mechanisms that are at his disposal. *See Paul Kadair, Inc. v. Sony Corp., supra*, 694 F.2d at 1031. *See also, Walters v. City of Ocean Springs*, 626 F.2d 1317 (5th Cir. 1980); *United States v. Bob Stofer Oldsmobile-Cadillac, Inc.*, 766 F.2d 1147 (7th Cir. 1985); *Pfeil v. Rogers, supra*, 757 F.2d at 857; *Barfield v. Brierton, supra*, 883 F.2d at 932.

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[4] Even if Petitioner's Motion can be considered under Rule 56(f), it was properly denied by the District Court because it failed to demonstrate specifically "how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact." *Securities & Exchange Commission v. Spence & Green Chemical Co., supra*, 612 F.2d at 901, quoting *Wilmar Poultry Co. v. Morton-Norwich Products, Inc.*, 520 F.2d 289, 297 (8th Cir. 1975), *cert. denied*, 424 U.S. 915, 96 S. Ct. 1116, 47 L. Ed. 2d 320 (1976). Petitioner did not state specifically how the testimony elicited during the depositions in question would have rebutted the contentions made in Respondent's Motion, but rather stated only that he experienced troubles with the court reporting service retained by his counsel to record and transcribe those depositions. As such, Petitioner's motion fails as a Rule 56(f) motion for want of compliance with the Rule's requirements.

Here, the District Court's denial of the Motion for Extension was within its sound discretion and was fully supported by the procedural history of this case. Respondents' Motion was filed on February 17, 1987. Between March 6, 1987 and December 9, 1987, Petitioner requested four (4) extensions of time to conduct discovery and/or to file his brief opposing Respondents' Motion, all of which the District Court either explicitly or implicitly granted. Indeed, the December 10, 1987 order gave Petitioner *sixty-seven* (67) days after the close of discovery to file a response to a brief which Petitioner had in his possession for almost a year. The December 10, 1987 order, like the November 30, 1987 order, gave Petitioner notice that *no more extensions would be granted.* On February 29, 1988, when Petitioner requested yet another extension, citing his own "Hurricane Hugo" type excuse, he was simply "flouting" the District Court's stern admonition and pushing the credibility of the entire judicial process to the limit. *Mendez v. Banco Popular, supra,* 900 F.2d at 7.

In addition, nothing beyond Petitioner's control prevented him from preparing and filing his brief opposing Respondents' Motion within the prescribed time period. Given the finality of the District Court's briefing deadline, Petitioner should have taken all necessary measures to ensure that the evidence he needed to support his motion was readily obtainable to him, which measures, at the very least, could have included arranging for different court reporting firms to record and/or transcribe the various deponents' testimony. Moreover, nothing prevented Petitioner from preparing and filing an opposing brief using his own affidavit to create genuine issues of material fact. Nothing in the record, however, suggests that Petitioner took *any* steps whatsoever to file his brief opposing

Respondents' Motion either before or after February 29, 1988. Finally, between February 29, 1988 and September 12, 1991, the date on which the District Court ruled in Respondents' favor, Petitioner filed or proffered nothing with the District Court, not even the precious deposition transcripts.

Further evidence of Petitioner's dilatory conduct is his failure to depose any Case Western Reserve University personnel or any of the individual defendants until nearly one year after he filed the lawsuit. Petitioner did not even notice the depositions of the very individuals whose testimony Petitioner has identified on appeal as vital to the prosecution of his action until December, 1987, which was one and a half years after he filed his complaint and ten (10) months after the filing of Respondents' Motion. Petitioner could have deposed the individual defendants as early as June, 1986. Instead, he deliberately waited to depose these "crucial" witnesses until only after it became apparent that the District Court was ordering the conclusion of discovery.

Consequently, the District Court, to preserve its credibility, acted within its considerable discretion in denying the Motion for Extension under either Rule 6(b) or Rule 56(f). Surely, the District Court's decision was not a "manifest abuse of discretion", especially considering that the judicial process itself is so heavily dependent on the "credibility" of the trial judges. *Mendez v. Banco Popular, supra*, 900 F.2d at 7. As a result, the District Court's decision, carefully withheld until Petitioner's own conduct flouted its authority, was properly affirmed by the Sixth Circuit, and does not warrant further review by this Court.

II. This Court Should Not Review The Decision Below Because Petitioner's Question Presented For Review Relies Upon Hypothetical *Obiter Dictum* In The Sixth Circuit's Opinion.

Petitioner attempts to manufacture an issue from *obiter dictum* contained in the Sixth Circuit's unreported opinion. Specifically, the Sixth Circuit opined:

> [Petitioner] argues that his response to [Respondents'] motion could not be completed without the transcripts. [Petitioner's] counsel was present at these depositions. Yet, [Petitioner] did not file any response, which could have included counsel's affidavit stating the substance of the testimony that was given, even though he could not cite to specific transcript pages. [Petitioner] never filed the completed transcripts with the District Court and never filed a response to [Respondents'] motion for summary judgment. [Petitioner] did not move for reconsideration of the order denying extension of the February 29, 1988 deadline. [Petitioner] did not file anything further in this case until he filed a notice of appeal on October 10, 1991.

(*See* Sixth Circuit opinion, attached as Appendix A-2 to Petition for Certiorari, at 2-3).

Contrary to Petitioner's assertion, the Sixth Circuit did not contravene Rule 56 or the holding of *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 265 (1986), and has not expanded the types of evidence which may be filed in opposition to a motion for summary judgment. The Sixth Circuit merely suggested courses of conduct which Petitioner could have undertaken in lieu of moving the District Court, on the day his brief in opposition was due, for a fifth extension of time.

Also, the Sixth Circuit did not hold that Petitioner *should* have filed an affidavit from his counsel summarizing the critical deposition testimony. The court below merely suggested that an attorney, faced with a final deadline, could have submitted a response in several different ways in lieu of requesting a fifth extension of time.[5]

This Court has traditionally characterized *obiter dictum*, such as is present here, as a court's expression of opinion upon an issue not decided by the court. Of course, such language lacks the force of a judicial determination. *See McCormick Harvesting Machine Co. v. C. Aultman Co.*, 169 U.S. 606, 611, 12 S. Ct. 953, 42 L. Ed. 875, 877 (1898); *Ex Parte Bakelite Corp.*, 279 U.S. 438, 455, 44 S. Ct. 411, 73 L. Ed. 787, 796 (1929). *See also, R.A.V. v. City of St. Paul*, 505 U.S. _____, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) ("It is, of course, contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned.") Here, the language upon which Petitioner relies is merely *obiter dictum* from the Sixth Circuit's decision which does not relate to the District Court's denial of the fifth request for extension of time[6]

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[5] The Sixth Circuit was probably suggesting that when faced with the gravity of the District Court's final deadline, nothing in the Rules would have prevented Petitioner's counsel, as an officer of the court, from verifying, through an affidavit, summaries of the critical deposition testimony. Thereafter, when the actual deposition transcripts were available, the transcripts as well as an addendum to the brief containing the appropriate citations to the transcripts could have been filed.

[6] Contrary to Petitioner's assertion in his "Question Presented" to this Court, the District Court did not adopt the standard which Petitioner now contends contravenes Rule 56 (*See* Petition at i). In fact, the District Court simply denied Petitioners' Motion for Extension without rendering an opinion.

(*See* A1). Indeed, the Sixth Circuit's suggestion was not an issue before the District Court, nor does it relate to whether or not the District Court abused its discretion.

Moreover, to characterize the Sixth Circuit's *obiter dictum* as an invitation to violate the Code of Professional Responsibility, as Petitioner suggests at p. 23 of his Petition, is pure folly.[7] The referenced language merely reflects the Sixth Circuit's awareness and criticism of Petitioner's failure to do anything in response to the District Court's denial of his Motion for Extension and advises Petitioner of more prudent measures which *could have been taken* before the District Court granted Respondents' Motion.

What Petitioner actually seeks is an advisory opinion from this Court addressing the hypothetical situation where an attorney actually responds to a motion for summary judgment by filing, in affidavit form, a summary of a deponent's testimony, or where a district court bases its denial of an extension of time on counsel's failure to use his own affidavit to oppose a motion for summary judgment. Neither of those situations were before the District Court or the Sixth Circuit. To place either of those hypothetical situations before this Court would be beyond this Court's jurisdiction. *See, e.g., North Carolina v. Rice,* 404 U.S. 244, 92 S. Ct. 402, 30 L. Ed. 2d 413 (1971); *Lewis v. Continental Bank Corp.,* 494 U.S. 472, 110 S. Ct. 1249, 108 L. Ed. 2d 400 (1990). Petitioner propounds this

[7] An affidavit from counsel accurately summarizing deposition testimony followed by the filing of the actual transcripts would not transform counsel into a witness within the purview of Disciplinary Rule 5-101(B).

hypothetical question to direct the Court's attention away from the sole issue before the Sixth Circuit, and, correspondingly, the sole question presented for this Court's review: *i.e.*, whether the District Court abused its discretion in denying Petitioner's fifth request for an extension to conduct discovery and/or file his brief opposing Respondents' Motion, given the procedural history of this litigation. As shown earlier, the District Court acted completely within its discretion given Petitioner's dilatory behavior and there is no need to review that decision further.

III. Petitioner's Claim That The District Court Violated The Provisions Of Rule 56(c) Must Fail Not Only Because It Has No Foundation In The Record But Also Because Petitioner Waived Such Claim By Failing To Assign It As Error Before The Sixth Circuit.

Petitioner's final argument is meritless not only because the District Court afforded him over four (4) years notice to file his brief and/or evidence opposing Respondents' Motion but also because he failed to timely raise it as an issue before the Sixth Circuit. The record before the Sixth Circuit indisputably demonstrated that the Respondents' Motion was filed on February 17, 1987, and that the Respondent's Motion was granted on September 12, 1991. Thus, the District Court did not render summary judgment against Petitioner, *sua sponte*, but rather upon Respondents' Motion, of which Petitioner had notice, but which he basically ignored. To suggest otherwise, as Petitioner does here, completely misstates the procedural history of this litigation.

Petitioner also failed to raise this issue in his Sixth Circuit appellate brief. Rather, Petitioner objected to the District Court's September 12, 1991 decision for the first time in his Sixth Circuit *reply* brief. Petitioner's failure to raise this issue in his initial Sixth Circuit brief prevents him from asserting it now. *See, e.g., Mississippi River Corp. v. Federal Trade Commission*, 454 F.2d 1083, 1093 (8th Cir. 1972).[8]

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[8] *See also, Ohio Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 776 F.2d 646, 656 n.13 (6th Cir. 1985); *Jasperson v. Purolator Courier Corp.*, 765 F.2d 736, 740-41 (8th Cir. 1985); *McCall v. Andrus*, 628 F.2d 1185, 1187 (9th Cir. 1980).

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari must be denied.

Respectfully submitted,

JOEL A. MAKEE
MARK J. VALPONI, *Counsel of Record*
ROBERT A. BRINDZA, II
KELLEY, MCCANN & LIVINGSTONE
35th Floor, BP America Building
200 Public Square
Cleveland, Ohio 44114-2302
(216) 241-3141
Attorneys for Respondents

APPENDIX

PETITIONER'S MOTION FOR EXTENSION OF TIME AND MARGINAL ENTRY OF THE UNITED STATES DISTRICT COURT DENYING MOTION

(Motion Filed February 29, 1988;
Motion Denied March 1, 1988)

Case No. C86-1941

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NWABUEZE V. OKOCHA,
Plaintiff,

vs.

CASE WESTERN RESERVE UNIVERSITY, *et al.*,
Defendants.

JUDGE ALICE M. BATCHELDER

MOTION FOR EXTENSION OF TIME

Now comes plaintiff, by and through counsel, and hereby moves this Honorable court pursuant to Fed. R. Civ. P. 56 (f) and 6(b), for an order granting plaintiff additional time to respond to Defendants' Motion For Summary Judgment. Plaintiff requests an additional ten (10) days after plaintiff's receipt of the transcript of

Depositon [sic] of Jerome Lando. Reasons in support of this motion are contained in the affidavit and brief which is attached hereto and incorporated herein by reference.

Respectfully submitted,

/s/ J. ANDREW HOERNER
MARK A. KAISER &
J. ANDREW HOERNER
Attorneys for Plaintiff
459 The Arcade
Cleveland, Ohio 44114
(216) 687-1838

Denied. So ordered.
/s/ AMB 3/1/88

CERTIFICATE OF SERVICE

A copy of the foregoing Motion For Extension of Time has been duly served upon Mark J. Valponi, Esq., Kelly [sic], McCann & Livingstone, 300 National City, East 6th Building, Cleveland, Ohio 44114, by personal delivery on this 29th day of February, 1988.

/s/ J. ANDREW HOERNER
MARK A. KAISER &
J. ANDREW HOERNER
459 The Arcade
Cleveland, Ohio 44114
Attorneys for Plaintiff

BRIEF IN SUPPORT

Plaintiff herein completed the discovery necessary to respond to Defendants' Motion For Summary Judgment prior to the December 24 cut-off date set in the Court's Order of December 10, 1987. The court reporting firm employed by plaintiff, "Reporters, Etc.," agreed to provide transcripts no later than January 15, 1988. (See attached Affidavit of Linda Jones.) Reporters, Etc. had not completed the transcripts of any of the depositions on January 15, 1988. Plaintiff repeatedly contacted the aforementioned reporting firm to make inquiries and express concern about the delay in producing the deposition transcripts.

Plaintiff did not receive copies of the deposition of Jack Koenig and Babara [sic] Leach until yesterday. Plaintiff has still not received a copy of the Deposition of Jerome Lando. A review of the facts, pleadings, and pending Motion for Summary Judgment leads plaintiff to believe that a meaningful response to said motion is impossible without the transcript of the Lando deposition. (See attached affidavit of J. Andrew Hoerner.)

The delay described above was caused by factors beyond plaintiff's control. The interests of justice therefore dictate that this Motion For Extension of Time be granted so that the Court may effectively reach the merits of this case.

Respectfully submitted,

/s/ J. ANDREW HOERNER
MARK A. KAISER &
J. ANDREW HOERNER
Attorneys for Plaintiff
459 The Arcade
Cleveland, Ohio 44114
(216) 687-1838

STATE OF OHIO)
) SS
COUNTY OF CUYAHOGA)

AFFIDAVIT

I, LINDA JONES, being first duly sworn, do hereby depose and say:

1. My name is Linda Jones

2. I am the owner and manager of "Reporters, Etc.," a small court reporting firm.

3. My firm is responsible for reporting the depositions taken by plaintiff in the matter of *Okocha v. Case Western Reserve University, et al.*, Case No. C86-1941, in the U.S. District Court for the Northern District of Ohio, Judge Alice Batchelder presiding.

4. I was asked to have the transcripts in the above case ready by January 15, 1988, and originally agreed to that schedule. However, due to a back log in my firm's work load and a shortage of transcription personnel, we have not been able to achieve that schedule.

5. the deposition of Jack Koenig and Barbara Leach are 395 pages and 115 pages long, respectively. They were completed and delivered on the evening of Sunday, February 28, 1988.

6. The deposition of Jerome Lando is not yet transcribed, however it will be completed within the next fifteen (15) days.

Further affiant sayeth naught.

/s/ LINDA J. JONES
Linda Jones

SWORN TO BEFORE ME, and subscribed in my presence, this 29th day of February, 1988.

/s/ JACQUELINE BELL
Notary Public
My commission expires
August 26, 1991.

Case No. C86-1941

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NWABUEZE V. OKOCHA,
Plaintiff,

vs.

CASE WESTERN RESERVE UNIVERSITY, *et al.*,
Defendants.

JUDGE ALICE M. BATCHELDER

AFFIDAVIT OF J. ANDREW HOERNER

J. ANDREW HOERNER, having been duly sworn according to law, states as follows:

1. I am the attorney for plaintiff in the above captioned action.

2. The review of the pleadings and other documents filed in this action, and the facts known to us at this time, cause me to believe that the Deposition of Jerome Lando is necessary before I can file a meaningful response in opposition to the Motion For Summary Judgment filed by the defendants.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ J. ANDREW HOERNER
J. Andrew Hoerner

SWORN TO BEFORE ME, and subscribed in my presence this 29th day of February, 1988.

/s/ SUSAN M. WEAVER
Notary Public

SUSAN M. WEAVER, Attorney At Law
Notary Public, State of Ohio
My commission has no expiration date.
Section 147.03 R. C.

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed November 30, 1987)

Case No. C86-1941

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NWABUEZE V. OKOCHA,
Plaintiff,

v.

CASE WESTERN RESERVE UNIVERSITY, *et al.*,
Defendants.

JUDGE ALICE M. BATCHELDER

ORDER

Plaintiff is hereby granted an extension of time until December 11, 1987, to complete all discovery and respond to the motion of defendants for summary judgment. There will be no further extensions of time granted.

IT IS SO ORDERED.

Dated this 30th day of November, 1987.

/s/ ALICE M. BATCHELDER
United States District Judge

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed December 10, 1987)

Case No. C86-1941

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

NWABUEZE V. OKOCHA,
Plaintiff,

v.

CASE WESTERN RESERVE UNIVERSITY, *et al.*,
Defendants.

JUDGE ALICE M. BATCHELDER

ORDER

On December 9, 1987, the Court conducted a discovery conference in the above-captioned matter to resolve all pending discovery disputes. As a result of this discovery conference the Court hereby orders:

1. that Plaintiff shall provide this Court by December 10, 1987, with specific information, including the names of specific graduate students who received financial aid from foreign governments while, at the same time, they received financial aid from the defendant University, which tends to show that, with respect to financial aid, the Plaintiff was treated in a manner inconsistent with the manner in which other foreign graduate students were treated;

2. that with respect to the notices of deposition and subpoenas duces tecum which have been served upon Jerome B. Lando, Jack L. Koenig, Jean Starky, and Barbara Leach, only those categories of documents which the Court has circled need be produced, that those which the Court has drawn a line through need not be produced, and that copies of these notices of deposition and subpoenas duces tecum with the appropriate markings have been attached to this order;

3. that the discovery deadline in this matter is hereby extended to December 24, 1987;

4. that Plaintiff shall respond to the Defendants' motion for summary judgment on or before February 29, 1988; and

5. there will be no further extensions of the dates set forth in paragraphs 3 and 4.

IT IS SO ORDERED.

Dated this 10th day of December, 1987.

/s/ ALICE M. BATCHELDER
United States District Judge

PETITIONER'S "STATEMENT OF ISSUES PRESENTED" FILED IN THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF ISSUES PRESENTED

I. Whether the District Court committed reversible error by denying Appellant's Rule 56(f) Motion and an opportunity to file a brief, opposing affidavit and deposition transcripts to counter the Appellees' motion for summary judgment where the evidence to be offered by Appellant upon receipt of certain deposition transcripts undoubtedly would have established genuine issues of material fact as to each claim?